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NO. 92-2022

IN THE
UNITED STATES SUPREME COURT
October Term, 1992

CITY OF KANSAS CITY, MISSOURI,
Petitioner,

vs.

ELVIS TOLEFREE,
Respondent.

RESPONDENT ELVIS TOLEFREE'S RESPONSE TO PETITION FOR CERTIORARI

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Date: August 19, 1993

I. MATERIAL MISSTATEMENT OF FACTS

Under the heading "FACTS", the City of Kansas City, Missouri (hereinafter "City" or "Petitioner") misstates and/or omits salient and material facts, which if they had been mentioned would cause its petition to implode upon itself. While the specter of such a phenomenon may account for the omission of those facts, such an omission also runs the risk that the petition may be granted "in the mistaken belief that the issue presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case". Rule 15.1.

The City fails to mention the following salient facts:

1. That in April 1984, Tolefree filed a charge of race discrimination with the City's Department of Human Relations, in which he alleged that because he is an African-American, he was denied training as an extra driver, subjected to derogatory remarks, instructed to remain at his rig during fires, and sanctioned for insubordination. The disposition of this charge is not clear from the record. (App. 2).

2. That in September 1986, Tolefree again filed a charge against the City with the City's Department of Human Relations and with the Equal Employment Opportunity Commission (EEOC). His 1986 charge asserted that his August 1986 "unsatisfactory" rating was in retaliation for filing the 1984 discrimination charge. (App.2)

3. That at the same time that Tolefree was challenging his unsatisfactory ratings before the Board, he was pursuing his claims of discrimination with the Kansas City Department of Human Relations under the Administrative Code,

> Code of General Ordinances of Kansas City, Article IX, Secs. 26.201-26.214. Tolefree raised the discrimination issue at the administrative level in an appropriate forum other than the Personnel Appeals Board. (App. 8)

The Eighth Circuit, indeed, exhaustively examined the distinctions between the separate administrative routes provided by the City's Department of Human Relations and that provided by the City's Personnel Department, of which the Personnel Appeals Board was an advisory component, final authority being vested in the City Manager. Tolefree, of course, pursued both of these. One, the Human Relations Department, was created specifically to deal with matters involving "discriminatory employment practices", Sec. 26.211, such as race and retaliation. The latter, the Personnel Appeal Board, however, was created to deal with other personnel issues not involving "discriminatory employment practices". As the Eighth Circuit correctly noted, "The City's charter limited the Board's involvement to a consideration of whether Tolefree's dismissal was justified." (App. 7). The Eighth Circuit's analysis was substantially aided through the means of "Supplemental Briefs and Appendices" and two separate "Petitions for Rehearing with Suggestions for Rehearing En Banc", and Responses thereto from the Respondent, filed by the City and Tolefree, at the Eighth Circuit's request.

Should the entire record come up before this Court, especially "Administrative Code, Code of General Ordinances of Kansas City, Article IX, Secs. 26.201-26.214" (App.8)

which the City strategically and tactfully did not include in its appendix, it will become apparent why no action was ever taken on Tolefree's race and retaliation claims by the City's Human Relations Department. This was because the City Attorney's Office, which provides "legal assistance" to the director of human relations, Sec. 26.210, would have been engaged in a conflict of interest, since it must represent discrimination claimants before that entity, Sec. 26.204; yet, defend the City before the Personnel Board. Hence, it would have been in the anomalous position of representing Tolefree, against the City, on his race and retaliation claims, in the Human Relations Department, and representing the City against Tolefree at the Personnel Appeals Board.

The City, of course, could have set this forth in its "FACTS", and it could have set forth the relevant ordinance in its appendix. But, of course, such would have detonated the very implosion that it feared. Hence, its silence. For this court's convenience referenced portions of the City's civil rights ordinance are appended hereto.

The facts as presented by the City misstate and/or omit salient and material facts. For this reason alone the petition for writ of certiorari should be denied.

II. MIS-APPLICATION OF LAW

A. Brown v. St. Louis Police Dept. is still good law

Notwithstanding two (2) different opinions in the instant case, 964 F. 2d 803 (8th Cir. 1992), vacated, 975 F. 2d 434 (8th Cir. 1992), re-issued, 980 F. 2d 1171 (8th Cir. 1992), Brown v. St. Louis Police Dept., 691 F. 2d 393 (8th Cir. 1982) is still good law in the Eighth Circuit. Tolefree did not overturn, nor limit the application of Brown. Therefore, the City's argument "flee[s] when none pursueth", Lev.26:17.

Because Brown is still good law in the Eighth Circuit, it is consistent with all of the cases cited in Parts I, II and III of the City's argument. There is no conflict between Brown and any of the City's cited cases in parts I, II, and III. On the contrary, Tolefree is a case unique to its own facts:

> We cannot, therefore, accuse Tolefree of failing to raise the discrimination issue at the administrative level; he simply raised it in an appropriate forum other than the Personnel Appeals Board. Tolefree did not appeal the Human Rights Department's decision in state court, so he is not precluded from bring a Title VII action in federal court.

980 F. 2d at 1175-1176; (App. 8). Elvis Tolefree luckily exhausted every avenue available to him. He did all that the law required. He could have done no more than he did.

There being no inconsistency between Brown and Tolefree in the Eighth Circuit, as that circuit has reconciled both cases in its two decisions. And, since Brown is homologous to the authority from the other circuits, with which the City contends that Tolefree conflicts, it is apparent that

as Tolefree is reconcilable with Brown, Tolefree, is likewise reconcilable with the other cases. In fine, Tolefree, is a case of limited utility, unique to its own facts, fully reconcilable with Brown and related cases.

B. Tolefree is consistent with Elliott

The instant case is actually supported by University of Tennessee v. Elliott, 478 U.S. 788 (1986). Hence, it is difficult to see for what purpose the City has cited it in part IV of its argument. In Elliott, a black employee was deemed to be entitled to a trial de novo on his Title VII claim, even though he had gone through an exhaustive state administrative proceeding, during which the state administrative law judge determined that the actions taken by the employer were not racially motivated. The District Court in Elliott, like the District Court below, granted summary judgment to the employer holding that the state administrative finding was entitled to preclusive effect. Also like this case, the Sixth Circuit Court of Appeals reversed the District Court. This Court, then, in reliance upon Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), and Chandler v. Roudebush, 425 U.S. 840 (1976), reasoned that Congress intended Title VII claimants to have a trial de novo, and that a state administrative finding did not have a preclusive effect on a Title VII claim in federal

court, affirming the Sixth Circuit's ruling with respect to Title VII.

Tolefree is even stronger than Elliott. For one thing, Elliott presented evidence in the "state administrative proceeding" that the "charges against him were actually motivated by racial prejudice and hence not a proper basis for his proposed discharge." 478 U.S. at 791. Tolefree did not. Neither race nor retaliation were ever presented. Secondly, there was no doubt but that Elliott was proceeding under the "Tennessee Uniform Administrative Procedures Act", 478 U.S. at 790, in a state administrative proceeding. However, the City's Personnel Appeals Board is not a "state agency". The Supreme Court of Missouri has concluded that the Missouri legislature has not accorded to its political subdivisions the power to create a cause of action for the violation of an anti-discrimination ordinance and to create an agency to determine and enforce a violation of that ordinance. Yellow Freight Systems v. Mayor's Com'n, 791 S.W. 2d 382, 387 (Mo. banc 1990). Thus, the Personnel Appeals Board decision in Tolefree is, as a matter of Missouri law, not entitled to the same weight that the state administrative proceeding in Elliott was accorded.

Thus, because Elliott enjoys continuing vitality, there is no need to accord certiorari in Tolefree.

III. CONCLUSION

The City's Petition for Certiorari fails to expose a split between the circuits and fails to demonstrate a legitimate or rationale basis for the grant of certiorari. As such, the petition should and must be denied.

WHEREFORE, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 19th day of August 1993 to:

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LARRY DELANO COLEMAN, ESQ.

ARTICLE IX. CIVIL RIGHTS ORDINANCE OF KANSAS CITY, MISSOURI*

Sec. 26.201. Definitions.

For the purposes of this article, and sections herein, the following definitions shall apply unless the context explicitly indicates otherwise:

(1) *Board:* Civil rights board.

(2) *City:* City of Kansas City, Missouri.

(3) *Complaint:* A verified written statement of facts and circumstances, including dates, times, places and names of persons involved in any alleged violation of any provision of this article.

(4) *Complainant:* Any person claiming injury by the alleged violation of this article.

(5) *Department:* Department of human relations.

(6) *Director:* The director of the human relations department.

(7) *Handicapped person:*

With respect to employment: Means a handicapped person who is otherwise qualified and with reasonable accommodation, can perform the essential functions of the job in question.

Generally: Any person who:

(a) Has a physical or mental impairment which substantially limits one (1) or more major life activities:

(b) Has a record of such impairment; or

(c) Is regarded as having such an impairment.

(8) *Parties:* The parties to any proceeding or hearing held pursuant to this article shall be the complainant and the respondent.

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*Editor's note—Section 1 of 2nd C.S. Ord. No. 53581, adopted Mar. 26, 1982, repealed former art. IX, §§ 26.201—26.214, the city's fair housing act, derived from Ord. No. 35218, adopted Apr. 19, 1968, and enacted in lieu thereof a new art. IX, §§ 26.201—26.214. Art. II½, §§ 26.74—26.77.1, inclusive, enacted by C.S. Ord. No. 32546 on July 21, 1967, was repealed by Ord. No. 35217, passed Apr. 19, 1968.

(6) *Conciliation.* To attempt to eliminate any unlawful practice or any alleged violation of the terms of this article by means of conference, conciliation, persuasion and negotiation, and to assist parties to enter into conciliation agreements.

(7) *Prehearing conference.* At least ten (10) working days prior to any hearing before the board, the director may call a conference of all parties concerned in any alleged violation of this article for the purpose of attempting to conciliate the same. Such conference shall be informal, no record of the proceeding shall be kept and no testimony shall be given or received at any hearing before the board concerning endeavors to conciliate any alleged violation of this article.

(8) *Dismiss complaints.* To dismiss any complaint upon finding such to be frivolous or without merit on its face.

(9) *Reject affirmative action programs.* To reject any affirmative action program for failure to conform to the rules adopted applicable to such. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.204. Complaint procedure.

Any person claiming injury by an allegedly unlawful discriminatory practice may, by himself or by his attorney, make, sign and file a verified written complaint with the director on forms provided by the director, which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the director for the investigation of the complaint.

Any complaint filed pursuant to this article must be so filed within one hundred eighty (180) days after the alleged unlawful discriminatory practice was committed.

After the filing of any complaint, the director shall promptly serve through certified mail (return receipt requested) a copy thereof upon the respondent and all other persons deemed to be necessary parties, and make prompt investigation in connection therewith.

After the filing of any complaint, or whenever the director has reason to believe that an unlawful discriminatory practice has been

committed, the director shall make a prompt investigation in connection therewith.

If it shall be determined after such investigation that no probable cause exists for crediting the allegations of the complaint, the director shall cause to be issued and served upon all parties written notice of such determination.

If it shall be determined after such investigation that probable cause exists for crediting the allegations of the complaint, the director shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion.

If in the judgment of the director the circumstances so warrant, he may at any time after the filing of the complaint endeavor to eliminate such allegedly unlawful discriminatory practice by conference, conciliation and persuasion. Each conciliation agreement shall include provisions requiring the respondent to refrain from the commission of such allegedly unlawful discriminatory practice in the future and may contain such further provisions as may be agreed upon by the director and the respondent. The director shall not disclose what has transpired in the course of such endeavors and shall not make or maintain a public record of such endeavors as the term "public record" is defined at section 610.010(4) RSMo.

If the respondent and the director agree upon conciliation terms, the director shall compile such and serve upon the complainant a copy of the proposed conciliation agreement. If the complainant agrees the terms are fairly set out in the agreement or fails to object to such agreement within fifteen (15) calendar days after its service upon him, the director shall issue an order embodying such conciliation agreement and shall serve a copy of such agreement upon all parties to the proceedings.

If the director believes that he has failed to eliminate an allegedly unlawful discriminatory practice by such means, he shall cause to be issued and served a written notice of a failure to eliminate the alleged discriminatory practice by conference, conciliation and persuasion.

In case of failure to eliminate such discriminatory practice, the director shall cause to be issued and served a written notice, to-

gether with a copy of such complaint as it may be amended, requiring the respondent to answer the charges of such complaint at a public hearing before a panel of at least three (3) members of the board sitting as the board.

The case in support of the complaint shall be presented before the panel by the city attorney. No member of the board panel shall participate in the investigation, and the aforesaid endeavors at conciliation shall not be received in evidence. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.205. Action by the board.

(a) *Hearing Date To Be Set.* Upon receipt from the director of a written complaint or of a written request for appeal made within the specified time, the board shall, within ten (10) days of receipt thereof, set a date upon which it will hold a hearing and shall notify all parties of the date thereof. Hearings shall be set not less than thirty (30) nor more than ninety (90) days after receipt by the board of a request for appeal.

(b) *Notice of Hearing.* A notice of hearing shall be served upon the parties at least twenty (20) days prior to the date of the hearing. Such notice shall state the caption and number of the case and the time and place of hearing. A copy of the complaint as amended shall be attached to each such notice.

(c) *Record of Proceedings.* The board shall cause all proceedings before it to be suitably recorded and preserved, provided, that no transcription of such record shall be made except at the request and expense of the party desiring such transcription. Any party may have a copy of all or any part of the record of any proceeding upon payment of proper charges therefor.

(d) *Hearing Procedure.* The hearing shall be conducted in the manner provided in chapter 536 RSMo. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.206. Refusal to permit inspection or failure to obey subpoena—Punishment.

If any person fails, neglects or refuses to obey all the terms of any subpoena or subpoena *duces tecum* issued by the civil rights appeal

Sec. 26.208. Confidentiality.

No documents which have been submitted nor anything which has been said or done during the course of a conciliation endeavor or as a result of an affirmative action program submission shall be made public or used as evidence in any subsequent proceedings without the written consent of the parties concerned, except when such statements or documents are a public record as defined at 610.025 RSMo or except when such statements or documents are used as evidence before the civil rights board. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.209. Injunctive relief.

If at any time after the filing of a complaint alleging a discriminatory practice under this article the director determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the civil rights board may enter in such proceeding, the director may recommend that the city, with representation by the city attorney's office, apply to the circuit court in any county where the alleged discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, for an order requiring the respondent to show cause why he or she should not be enjoined from doing or procuring such act to be done. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.210. City attorney to assist director.

The city attorney shall render to the director of human relations such legal assistance as may be necessary in the administration and enforcement of the provisions of this article, and shall present the cases set for hearing by the director. (2nd C.S. Ord. No. 53581, 3-26-82)

Sec. 26.211. Discriminatory employment practices.

Sections 26.211 through 26.214 of the Code of General Ordinances apply to discriminatory employment practices which occur within the corporate limits of the City of Kansas City, Missouri. (2nd C.S. Ord. No. 53581, 3-26-82)